Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications	)	GN Docket No. 94-90

MEMORANDUM OPINION AND ORDER

Adopted: June 16, 1997 **Released: June 30, 1997**

By the Commission:

I. INTRODUCTION

1. On March 7, 1995, the Commission modified its rules governing licensee eligibility in the Specialized Mobile Radio ("SMR") services. We eliminated those portions of Sections 90.603(c) and 90.703(c) of our rules,[1] which prohibited wireline telephone companies from holding or controlling SMR and commercial 220 MHz licenses. In addition, we eliminated our prohibition on the provision of dispatch service by providers of Commercial Mobile Radio Services ("CMRS"), licensed under Part 22 and Part 24 of the Commission's Rules.[2] Presently before us is a Request for Partial Reconsideration and for Clarification of the *Report and Order* filed by the American Mobile Telecommunications Association, Inc. ("AMTA").[3] AMTA asks that we reconsider the lifting of the prohibition on provision of dispatch services by Part 22 and Part 24 licensees, or in the alternative, that we delay implementation of the repeal.[4] For the reasons set forth below, we deny reconsideration of our decision and we decline to delay its implementation. AMTA also seeks clarification of a statement in the *Report and Order* that we

[1] 47 C.F.R. § 90.603(c) and 90.703(c).

[2] Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications, *Report and Order*, 10 FCC Rcd 6280 (1995) *(Report and Order)*.

[3] Request for Partial Reconsideration and for Clarification of the American Mobile Telecommunications Association, Inc., GN Docket No. 94-90 (April 24, 1995) (AMTA Request).

[4] AMTA Request at 3-7.

will permit Part 22 licensees to provide non-interconnected dispatch service.[5] Finally, AMTA requests that we reclaim and relicense spectrum unused by cellular licensees, as a means to more effectively utilize CMRS spectrum that otherwise could be used for dispatch services as a result of our decision in the *Report and Order*.

II. BACKGROUND

2. The dispatch prohibition, which Congress originally enacted as part of the 1982 amendments to the Communications Act, prohibited mobile service common carriers licensed after January 1, 1982, from offering dispatch service.[6] Congress retained its ban in the 1993 amendments to the Communications Act, but granted the Commission authority to repeal the ban in whole or in part if it felt that the public interest so justified.[7] In 1994, we issued a *Notice of Proposed Rulemaking* proposing, *inter alia*, to amend our rules to permit all mobile service common carriers to provide dispatch service.[8]

3. In the *Report and Order,* we adopted our proposal to permit all mobile service common carriers to provide dispatch service.[9] We concluded that the development of digital technologies, which increase spectrum efficiency, has minimized our previous concerns that using mobile service common carrier spectrum for dispatch would impair the licensees' capacity to provide mobile service. Further, because we felt that our new policy would significantly benefit the public by increasing competition and offering greater choice of service, we did not impose a sunset provision. The *Report and Order* thus permitted CMRS licensees to provide dispatch service upon the effective date of the rule changes.[10]

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[5] *Report and Order*, 10 FCC Rcd at 6297 n.96; AMTA Request at 7.

[6] *See* Communications Act of 1934, as amended, 47 U.S.C. § 332 (c)(2) (1982). In response to the Congressional prohibition, the Commission adopted rules implementing the ban. *See* 47 C.F.R. §§ 22.519(a), 22.911(d).

[7] *See* Omnibus Budget Reconciliation Act of 1993, ("Budget Act"), Pub. L. No. 103-66, § 6002(b)(2), 107 Stat. 312 (1993) and 47 U.S.C. § 332(c)(2).

[8] Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications, *Notice of Proposed Rulemaking*, 9 FCC Rcd 4405 (1994).

[9] *Report and Order,* 10 FCC Rcd at 6297.

[10] *Id.*

III. DISCUSSION

4. AMTA's Request. AMTA alleges that the record fails to support our actions with respect to the lifting of the dispatch ban.[11] Applicable regulations, according to AMTA, have only precluded wireline carriers from offering dispatch services in the bands above 800 MHz, but Part 22 carriers are free to offer dispatch communications on the same terms and conditions as Part 90 entities by offering the service on Part 90 spectrum.[12] AMTA challenges our conclusion that elimination of the dispatch prohibition will benefit rural communities and allow some rural subscribers to obtain low-cost dispatch service from third-party providers for the first time.[13] AMTA alleges that the fundamental issue in this proceeding is "not whether underutilized or unutilized Part 22 spectrum should be employed to inject additional competition into the already highly competitive dispatch marketplace," but "whether spectrum which has been determined to be superfluous for the provision of cellular service should be retained automatically by the cellular operator to be used for alternative purposes."[14] AMTA suggests that spectrum that is not needed to provide a cellular service should be recovered by the Commission and reassigned to whomever values it most highly as determined by competitive bidding.[15] AMTA urges that at a minimum, we delay repeal of the prohibition on dispatch until August 10, 1996 (three years from the date the Budget Act became law) as part of a transition period.[16]

5. In the event that we deny its request for relief, AMTA asks that we clarify that portion of footnote 96 of the *Report and Order* that states: ". . . we will permit Part 22 licensees to provide non-interconnected dispatch service, so long as their dispatch users also have the ability to utilize interconnected service if they so choose."[17] AMTA contends that "it is not clear whether this requirement must be satisfied by offering an integrated interconnected/dispatch service, or whether it would be met by providing parallel offerings, perhaps even by different parties."[18]

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[11] AMTA Request at 1-3.

[12] *Id.* at 3-4.

[13] *Id.* at 5 (citing *Report and Order*, 10 FCC Rcd at 6298).

[14] AMTA Request at 6.

[15] *Id.*

[16] *Id.* at 6 (citing Budget Act at Section 6002(d)(3)).

[17] *Report and Order*, 10 FCC Rcd at 6297, n.96.

[18] AMTA Request at 7.

6. Comments. Eleven parties filed comments in response to AMTA's Request.[19] The Cellular Telecommunications Industry Association ("CTIA") alleges that AMTA's pleading is procedurally defective because it merely reflects a philosophical disagreement with FCC policy. As such, it fails to state adequate grounds to justify reconsideration.[20] On the merits, CTIA supports the Commission's decision and argues that rural areas are likely to receive better service if carriers could economize by offering integrated service packages.[21] Furthermore, a number of parties argue that requiring cellular licensees to use Part 90 frequencies for dispatch services is technically impractical and costly to both providers and potential customers.[22] Similarly, SCCA argues that it is technically and economically more efficient to permit CMRS and dispatch services over the same licensed frequencies.[23]

7. Further, several parties claim that delaying implementation of the new policy would simply shield AMTA's members from competition.[24] A majority of the commenting parties were likewise critical of AMTA's suggestion that the Commission reclaim and auction unused cellular spectrum. CTIA points out that AMTA "essentially requests the Commission to partially revoke cellular licenses and to reallocate such spectrum by auction."[25] CTIA claims that the proposal is inconsistent with cellular growth patterns and that unused spectrum at a given period of time is not necessarily wasted spectrum.[26]

8. Discussion. We disagree that Part 22 licensees should only have the option of providing dispatch service on Part 90 frequencies. Requiring the use of a separate frequency for dispatch service imposes additional costs and wastes valuable spectrum. Under AMTA's proposed approach,[27] to provide dispatch service Part 22 licensees would incur substantial

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[19] The parties filing comments in this proceeding are as follows: The National Telephone Cooperative Association ("NTCA"); Bell South Corporation ("Bell South"); the Small Cellular Carrier Association ("SCCA"); AirTouch Communications, Inc/U.S. West New-Vector Group, Inc., ("AirTouch/New Vector"); McCaw Cellular Communications, Inc ("McCaw"); Sprint Corporation ("Sprint"); Rural Cellular Association ("RCA"); Cellular Telecommunications Industry Association ("CTIA"); Bell Atlantic Mobile Systems, Inc, ("Bell Atlantic"); Vanguard Cellular Systems, Inc ("Vanguard"); and GTE Service Corporation ("GTE").

[20] CTIA Comments at 4.

[21] *Id.* at 4.

[22] *See, e.g.,* BellSouth/New Vector Comments at 3; McCaw Comments at 5; NTCA Comments at 2-3.

[23] SCCA Comments at 3.

[24] *See, e.g.,* McCaw Comments at 5; SCCA Comments at 7; Sprint Comments at 4.

[25] CTIA Comments at 10.

[26] *Id.* at 14.

[27] AMTA Request at 4.

expense to obtain necessary licenses and construct additional facilities for Part 90 frequencies, thereby increasing the cost of service packages provided to customers. We agree with SCCA that an entity permitted to offer a variety of services over the same frequencies will have a competitive advantage over an entity prohibited from doing so.[28] Allowing certain providers to achieve operating and spectrum efficiencies and competitive benefits while leaving regulatory obstacles for other CMRS providers conflicts with our ongoing goal to provide regulatory parity for commercial mobile services as mandated by Congress.[29]

9. The record developed in this proceeding clearly supports our actions concerning the dispatch prohibition in the *Report and Order*. Although several parties suggested in response to the *Notice* that sufficient competition already existed throughout the United States for providing dispatch services,[30] the majority of commenters supported lifting the ban to permit all competing CMRS providers to provide the same types of services to facilitate regulatory parity. The record demonstrates that introducing new competitors by removing the dispatch ban for providers of commercial mobile services has the potential to lower costs to subscribers, increase the availability of choices, and improve the quality of service.[31] For instance, AirTouch stated in its comments in response to the *Notice* that its market research demonstrated that customers and potential customers wanted integrated packages that include a combination of text messaging, vehicle location, alpha-numeric paging, fax, dispatch and mobile voice services.[32]

10. We also disagree with AMTA's assertion that the *Report and Order* offered no evidence to support our conclusion that elimination of the dispatch ban would benefit potential rural customers. In the *Report and Order* we stated that "eliminating the dispatch prohibition for common carriers will make service available in areas where current options are limited. In particular, we expect that the elimination of the dispatch prohibition will benefit rural communities by facilitating competition in underserved areas and will allow some rural subscribers to obtain low-cost dispatch service from a third-party provider for the first time."[33] RCA reported in its comments in response to the *Notice* that dispatch services are not readily available in rural areas, and that because of the dispatch ban, rural cellular carriers have been unable to provide their customers with much needed dispatch services. According to RCA, such services are needed to assist ranchers and farmers to monitor the whereabouts of livestock and

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[28] *See* SCCA Comments at 3.

[29] *See* Budget Act, 107 Stat. 312 at § 6002(b)(2)(A); 47 U.S.C. § 332 (c)(2).

[30] *See, e.g.,* NABER Comments at 5; E.F. Johnson Company Comments at 3.

[31] *Report and Order,* 10 FCC Rcd at 6298.

[32] AirTouch Comments at 3.

[33] *Report and Order,* 10 FCC Rcd at 6298 (footnotes omitted).

produce as they move from ranches and farms to markets.[34] We received no conflicting information to indicate that these consumers are currently receiving, or otherwise will receive in the near future, much needed dispatch service.[35]

11. AMTA's request to reclaim and auction alleged unused cellular spectrum goes beyond the scope of the original rulemaking proceeding and is not necessary to the decisions reached in this rule making. A party cannot, through a petition for reconsideration, expand the scope of a proceeding by asking the Commission to adopt a proposal which was not part of the original *Notice*.[36] To do so would violate the Administrative Procedure Act, 5 U.S.C. § 553. In any event, there is no evidence that the spectrum alleged to be unused is in fact unused; rather, there is only evidence that the spectrum is desirable for offering dispatch services.

12. Finally, AMTA requests that we clarify our statement that "we will permit Part 22 licensees to provide non-interconnected dispatch service, so long as their dispatch users also have the ability to utilize interconnected service if they choose."[37] The Communications Act defines CMRS as "any mobile service . . . that is provided for profit and makes interconnected service available. . . to the public".[38] The statute defines private mobile service as "any mobile service (as defined in section 3[n]) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by the Commission."[39] Our rules reiterate that a mobile service may be classified as private only if it is neither a CMRS or the equivalent of a CMRS.[40] We are allowing Part 22 operators to offer non-interconnected service so long as the network on which the service is offered also has the capability of providing interconnected service to customers who want it. This is distinct from allowing Part 22 licensees to establish stand-alone Private Mobile Radio Services ("PMRS") networks that offer no interconnection capability, an issue which has been raised on reconsideration of our *CMRS Second Report and Order*.[41] Pending resolution of that issue, cellular and other Part 22 licensees are permitted to provide PMRS service only on a partial or hybrid basis with their CMRS

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[34] RCA Comments in response to *Notice* at 3-4.

[35] We need not consider AMTA's request that we delay the effective date of the repeal until August 10, 1996; given the release date of this *MO&O*, AMTA's request is now moot.

[36] *Illinois Bell Telephone Co. v. FCC*, 11 F.2d 776, 783 (D.C. Cir. 1990).

[37] *Report and Order*, 10 FCC Rcd at 6297 n.96.

[38] 47 U.S.C. § 332(d).

[39] 47 U.S.C. § 332(d)(3).

[40] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Servs., *Second Report and Order*, 9 FCC Rcd 1411, 1446 (1994) (*CMRS Second Report and Order*).

[41] *CMRS Second Report and Order*, 9 FCC Rcd 1411 (1994).

offerings as contemplated in the *CMRS Second Report and Order*.[42] In addition, offering PMRS services does not negate the obligations of Part 22 licensees to provide interconnected commercial mobile services.

IV. ORDERING CLAUSE

13. Accordingly, pursuant to Sections 4(i), 303(b), 303(r), and 405, 47 U.S.C. §§ 154(i), 303(b), 303(r), and 405 of the Communications Act of 1934, as amended, and Sections 1.429 of the Commission's rules, 47 C.F.R. § 1.429, IT IS ORDERED that AMTA's Request for Partial Reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[42] *Id.* at 1429.